Supreme Court, U.S.
FILED

No. 991121 OCT 21 1999

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

HECTOR V. LUNA, - PETITIONER
In pro se

VS.

COUNTY OF SAN BERNARDINO - RESPONDENT(S)
AND ITS PRIVITIES, THE SAN BERNARDINO COUNTY RETIREMENT BOARD.

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Hector V. Luna
1255 Reece St.
San Bernardino, CA 92411
(909) 888-0928

34pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not plaintiff has a vested property interest to a industrial injury disability through substantive and procedural ***due process***?

II. Whether or not the **breach of fiduciary duty** statute of limitation applies to a 1983 claim?

III. Whether or not this sec. 1983 case should be published for its uniqueness of a 10 year litigation period and a valued precedent for the protection of future disabled public employees?

IV. Whether or not the April 2, 1987 letter constitutes the impairment of contract responsibilities and obligations under the United States and California Constitutions' protecting contracts?

V. Whether or not plaintiff has ***42 sec. 1981*** **contractral rights** through ***42 sec. 1983*** remedies?

VI. Whether or not plaintiff has a vested property interest to the supplemental disability benefit?

VII. Whether or not plaintiff is entitled to retroactive monetary damages under the ***equal protection of law clause***?

VIII. Whether or not the ***Doctrine of res judicata*** **estoppel** by judgment precludes relitigation of an issue already adjudicated in a state court?

IX. Whether or not plaintiff has a protected ***property interest*** under the employer and employee contract where the limitations statute does not apply?

X. Whether or not a state court judgment can prove a set of facts in support of claim which would entitle relief?

XI. Whether or not an impairment of contractral obligation and responsibilities allegation are of material fact and taken as true on a motion to dismiss?

XII. Whether or not a breach of contract cause of action ***statute of limitation*** may be applied to a ***sec. 1983*** claim?

XIII. Whether the date of <u>*discovery*</u> of the fraud tolls the ***statute of limitations?***

XIV. Whether or not the tolling of the **statute of limitation** for **fraudulent concealment of a cause of action**, is a well-pleaded allegation of material fact and damage claims are taken as true and construed in a light most favorable to the non-moving party?

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STATEMENT OF THE CASE

A. Lower Court Proceedings

1. In this action, appellant alleged, among other things, that appellees denied him his constitutional right to property interest, due process, and equal protection under, 42 U.S.C. sec. 1983.

2. The job-related injuries issue was relitigated by the appellees, and such issue was precluded from any subsequent relitigation, therefore, plaintiff has a purpose of asserting a due process clause. (See App. 'I' p. 15a).

3. On Dec. 2, 1987, plaintiff filed a sec. 1983 deprivation of federally secured property interests.

4. A motion for summary disposition to plaintiff sec. 1983 claim was filed as an affirmative defense of the appellees.

5. On Jan. 29, 1998, the report and recommendation of U.S. Magistrate Judge to dismiss plaintiff's complaint was filed.

6. On Feb. 18, 1998, order adopting findings, conclusions and recommendations of U.S. Magistrate Judge was filed.

7. On May1, 1998, appellant appeals lower court decision to dismiss with prejudice plaintiff's sec. 1983 claim.

8. On March 18, 1998, appeals court panel affirms and files lower court's decision.

9. On Dec. 12, 1998, plaintiff motions to the appeals court a suggestion for rehearing *en banc*.

10. On July 23, 1999, the appeals court panel rejects plaintiff's suggestions for rehearing *en banc*.

11. On Oct. 19, 1999, plaintiff petitions the U.S. Supreme court for writ of certiorari to U.S. court of appeals for the ninth circuit. Petition for writ of certiorari.

12. The clerk of the U.S. Supreme court rejects petition on rule errors and gracefully allows plaintiff an additional 60 days to correct rule errors. Hopefully correct errors and resubmits petition for writ of certiorari to U.S. court of appeals for the ninth circuit. Petition for writ of certiorari in a timely manner.

STATEMENT OF FACTS

Hector Luna, (plaintiff) was a journeyman electrician for the County of San Bernardino, (main Appellee) and the San Bernardino County Employee's Retirement Association (hereafter Board, co-appellee) were parties to a County controlled written agreement (hereinafter C&R).

Plaintiff and Employer were under a collective bargain agreement (a contract) under the contract , there was the covenant of good faith and fair dealings on the basis of a contractral employer-employee relationship.

On Sept. 10, 1981, the employer cited the collective bargaining agreement as the authority for firing plaintiff for service-connected disability. (See App. 'E' p.9a). Thereafter, the County denied plaintiff any other gainful employment on the basis of plaintiff's disability. (See App. 'F' p.11a). Plaintiff had never got hurt before, and on Nov. 1981 plaintiff applied for a service-connected disability retirement and any other disability retirement benefits which he was entitled to under the pension plan.

On June 1983 the Board denied plaintiff's application with findings that his injuries had long since healed. Thereafter, plaintiff appealed such findings before the Superior Court in San Bernardino, CA.

On August 31, 1984, this court found plaintiff's substantially disabled in 1981 due to work-related injuries. Then, this court's ruling was: had there been any improvement in plaintiff's condition since 1981? (See App. 'G' p.12a).

On May 03, 1990, the Board finally accepted Dr. Gary Latourette, M.D. board-appointed physician's opinion that plaintiff was permanently incapacitated as an electrician orally given at the rehearing on July 18, 1985. (See App. 'H' p.14a).

The state court decision given on Aug. 31, 1984, was subject to the **Doctrine of res judicata**, estopped by judgment. (See App. 'I' p.15a). The appellee violated plaintiff's constitutional right to **Due Process** and **equal protection of law** when in violation of the **Doctrine of issue preclusion**, they set - aside the estopped by judgment and relitigated plaintiff's disability to be nonservice-connected, inflicting him with a loss of over $600.00 per month injury in the June 25, 1990, C & R. (See App. 'J' p.16a).

The Board's finding on May 03, 1990 that plaintiff's disability had not improved since 1981, closed this case, since the appellees were **collaterally estopped** from relitigating the causation issue. The County's claim that the Board acted along in the C&R has no merit, under the **Doctrine of collateral estoppel** in privity and a party to the C&R proceedings.

On April 2, 1987, the County sent plaintiff a letter to resign. (See App 'K' p.18a). Such letter constitutes an unconscionable act under the circumstances. The County knew plaintiff had been without any work income since the firing on Sept. 1981. The County also knew that plaintiff had not received no permanent disability benefits from the Board. The

unconscionable act against plaintiff infers racial bias, instead of complying with its contractral obligation, (as it is accustomed to do with white employees') the County gave plaintiff instructions that the options had run-out raising an estoppel cause of action. (See App. 'P' p.20a).

Under, the covenant of good faith and fair dealing obligation owed plaintiff, and since the Board's decision was final under ***Gov. code sec. 31725***, (See App. 'L' p.19a) the employer had two options, to seek judicial review of the Board's denial, and or reinstate plaintiff to a pay status retroactive to the date the employer fired him for disability. The employer's action at that particular time destroyed plaintiff's vested contractral right to pension benefits, which accrues upon acceptance of employment. (See App. 'M' p.19a). Where the employer took no action.

Under, ***sec. 31725*** and U.S. constitution, the employer did not perform its contractral duty after the Board's final denial of disability benefits. Thus, plaintiff asserts the employer did impair contractral obligations which greatly injured plaintiff. In ***Adams v. Albany***, 80 F. Supp. 876 reads: the statute of limitations are mere statutes of response which affect the remedy only, and passage of time does not destroy the obligation. Then, under ***section 31725***, and ***Phillips*** law precedent, (See App. 'O' p.19a) the County still has the obligation to pay plaintiff wages of $10.65 per hour retroactive to Sept. 1981. ***Gov. code sec 20164*** reads: "In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply."

The money owed to plaintiff due to violation of due process and equal protection in the C&R, are: service-connected disability retirement allowance of one-half of his last total monthly compensation, pursuant to ***Gov. code sec. 31720*** and $300.00 per month disability allowance for beneficiaries which the County deem incapable of gainful employment, (See App. 'E' p.9a and App. 'F' p.11a) pursuant to ***Gov. code sec. 31740***.

The accrual date set in this case by the court was May 23, 1995. A letter dated May 31, 1996 and addressed to Supervisor Jerry Eaves, from plaintiff, proves that though plaintiff read the May 23, 1995 letters, he still did not discover that fraud was his cause of action. (See App. 'R' p.21a).

Plaintiff discovered the fraud when in consultation with an attorney on or about Feb. 1, 1997. The court's error was in believing plaintiff had the same legal skills as an attorney, and such believe is *unfavorable* to the plaintiff and not in uniform with the rest of the 9th circuit courts. (See App. 'R' p.21a). In fraud, a toll statute starts upon ***discovery*** of the fraud.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in affirming the lower's court's dismissal of Appellant's federally secured property interests claim under 42 U.S.C. sec.1983, with prejudice. In light of ***Dallas School Dist. v. Norman Jell,*** (1989) 109 S.Ct. 2702 reads: under sec.1983 "action at law" provides the exclusive federally damages remedy for violations of rights guarantee by sec.1981 when the alleged violator is by a state actor. **42 U.S.C. sec's 1981-1983**, at p.2705 reads: "...Congress provisions of sec.1983 control in the context of sec.1981 damages action against state actors."

The case value of the **Due process** and **equal protection clauses of the 14th Amendment** is in the public interest of having a happy, efficient civil servant force for the welfare of the public and Country as a whole. It is particularly important that public employees be able to depend on the public employers obligation for the covenant of good faith and fair dealings as expressed on the employer-employee collective bargaining agreement. Long ago Congress was way-ahead of its time, and made sure that any arbritary and inferred racial bias against distinct racial minority groups, would have the same contractral rights to enforce against employers who did not treat all racial groups in a like manner under the same circumstances.

In the instant case, all a reasonable person has to see is the employer's letter dated April 2, 1987 (See App. 'K' p.18a and App. 'P' p.20a) a inducement to resign. Then go back to Sept. 10, 1981 (See App. 'E' p.9a) plaintiff fired due to service-connected disability. Continue to Dec. 10, 1981 (See App. 'F' p.11a) employer deemed plaintiff incapable of any gainful employment. Then continue on to the ultimate Breach of the covenant of good faith and fair dealing on June 25, 1990, the employer masterminds a nonservice-connected disability retirement in a County control agreement (See App. 'J' p.16a) and such ultimate bad faith action constitutes U.S. and California constitutional violations for impairment of contract obligations. And, such ultimate action continues to the present day, shielded by the one-year ***Cal. C.C. P. sec. 340(3)*** (See App. 'S'p.22a).

The employer's interpretation of the due process and equal protection clauses were these artful words: "Appropriate findings" to take the bad faith action. Obviously, the employer didn't believe a worker with brown skin must receive an oral or written notice of the evidence submitted to justify the deprivation of property interests or to allow this employee an opportunity to present evidence to help his cause on entitlement of pension benefits.

Since the breach of contract and fiduciary duty have been substantial causes of action here. Plaintiff relies on Cal. Case law ***Frazier v. Metro Life Ins. Co.,*** 214 Cal. Rptr. 83 (1985) for this case to go forward

on the ground of breach of covenant of good faith and fair dealing are contractral issues, and a breach of contract is governed by the four year limitation period of **Cal. C.C.P. sec. 337, (1)** plaintiff had until May 23, 1998 to file his **sec. 1983** claim, thus his Dec. 2, 1997 filing is timely. Furthermore, to be more direct, in ***Frazier*** at p.890, reads: "the defendants **Cal. C.C.P. sec. 340 (3)** argument is rejected." Plaintiff properly found their bad faith contract claim on **sec. 337 (1)** and its **four-year statute of limitation provisions**.

CONCLUSION

The **14th Amendment's due process** and **equal protection clauses** provide **sec. 1981** guarantee plaintiff constitutional protected property interest under contract and apply the **section 1983** remedy action to recover the monetary damage inflicted by the respondent's against plaintiff in the June 25, 1990, County Written instrument. Through contract or tort causes of action. (See App. 'Q' p.20a).

On a motion to dismiss pursuant to **Fed. R. Civ. p. 12(b)(6)** the lower courts errored on the theory that the duty of good faith and fair dealing is not strictly a contractral obligation it is an obligation imposed by law which governs a party to a contract in discharging its contractral responsibilities, and therefore, by construing in a light most favorable to the moving party, a limitation statute that had absolutely no relation to the contractral responsibilities of the appellees, was chosen, over plaintiff's contractral cause of action for enforcement under **sec. 1981** and his *only* remedy for damages under **sec. 1983**. (See App. 'Q' p. 20a).

Nonpayment of monetary damages caused by breach of contract, constitutes impairment of the contract by appellee County, and ultimate breach of fiduciary duty owed to plaintiff by the co-appellee Board. And, to dismiss a state court judgment constitutes an act that the judgment does not prove no set of facts in support of plaintiff's claim which would entitle him to relief. In violation of the uniformity under **F.R.C.P. rule 12(b)(6).**

RELIEF REQUESTED

Plaintiff respectfully requests this petition be granted and a writ of certiorari issue to review this case and remand to the lower court for trial on the merits.

Respectfully Submitted,

Hector Luna

Hector Luna, in pro se
1255 Reece St.
San Bernardino, CA 92411
(909) 888-0928

APPENDIX A – THE APPEALS COURT PANEL DENIES APPELLANT'S PETITION FOR REHEARING EN BANC.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR V. LUNA, Plaintiff - Appellant, v. THE COUNTY OF SAN BERNARDINO Defendant- Appellee.	NO. 98-55762 D.C. No. CV-97-08874-ABC Central District of California ORDER

Before: FARRIS, BRUNETTI, and SILVERMAN, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. *See* Fed R. App. P.35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. Appellant has submitted to the court a document entitled "Plaintiff's motion for addendum to Appellant's brief." We construe this document as a motion to file a Supplemental brief. That motion is denied.

APPENDIX B – THE APPEALS COURT PANEL AFFIRM THE LOWER COURT DISMISSAL WITH PREJUDICE OF PLAINTIFF'S SEC. 1983 CLAIM.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR V. LUNA,	)	No. 98-55762
Plaintiff - Appellant,	)	
	)	D.C. No. CV-97-08874 ABC
v.	)	
	)	
COUNTY OF SAN BERNARDINO,	)	
	)	MEMORANDUM*
Defendant - Appellee.	)	
	)	

Appeal from the United States District Court for the Central District of California Audrey B. Collins, District Judge, Presiding Submitted November 16, 1998**

Before: FARRIS, BRUNETTI, and SILVERMAN, Circuit Judges.

Hector V. Luna appeals pro se the district court's dismissal with prejudice of his 42 U.S.C. § 1983 suit against the County of San Bernardino, California. We affirm.

A district court's dismissal on statute of limitations grounds presents a question of law reviewed de novo. See Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) When the question turns on what a reasonable person should know, it is a mixed question of law and fact and is reviewed for clear error. See Bartleson v. United States, 96 F. 3d 1270, 1274 (9th Cir. 1996).

The district court found that Luna knew or had reason to know of the basis of any cause of action against the County no later than May 23, 1995. On that date, the San Bernardino County Employees' Retirement Association informed Luna by letter that the Board of Retirement denied Luna's supplemental disability retirement allowance.

Federal civil rights claims are subject to the statute of limitations applicable to personal injury claims under state law. Wilson v. Garcia, 471 U.S. 261, 279-80 (1985). Luna filed this suit on December 2, 1997. This action is therefore barred by the one year limitations set forth in Cal. Civ. Proc. Code § 340(3) (West 1982).

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX C – THE DISTRICT COURT ORDER ADOPTION FINDINGS, CONCLUSION & RECOMMENDATION OF U.S. MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HECTOR LUNA, Plaintiff, v. THE COUNTY OF SAN BERNARDINO, et al., Defendants.	Case No.: CV 97-8874-ABC (RNB) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has conducted a review of all the records and files of this case, including the Report and Recommendation of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

It is ORDERED that defendant County of San Bernardino's Motion to Dismiss be granted, and that Judgment be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment in this matter by United States mail on plaintiff and counsel for defendants.

Dated: Feb. 18, 1998

AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

APPENDIX D – THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HECTOR LUNA,	)	NO: CV 97-8874-ABC (RNB)
Plaintiff,	)	
vs.	)	REPORT AND RECOM-
	)	MENDATION OF UNITED
THE COUNTY OF SAN	)	STATES MAGISTRATE JUDGE
BERNARDINO, et al.,	)	
Defendants.	)	
	)	

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff, proceeding pro se, filed his original Complaint on December 2, 1997, after paying the applicable filing fee. The Complaint was styled as "Complaint for deprivation of federally secured constitutional and civil rights under title 42, U.S. Code, section 1983-86." Concurrently, plaintiff filed two other documents, styled respectively as a "Supplemental Complaint' and a "Second Supplemental Complaint."

Now pending before the Court and ready for decision is defendant County of San Bernardino's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The County contends that plaintiff's action is barred by the applicable statute of limitations; that the County is not a proper defendant; and that the facts as pled do not establish any potential liability against the County. As discussed hereafter, the Court concurs with the County that, based on the allegations of the Complaint, plaintiff's federal civil rights claims are time barred. See, e.g., Vaughan v. Grijalva, 927 F.2d 476, 479 (9th Cir. 1991) ("A statute of limitations defense may be raised by a motion

to dismiss if the running of the limitations period is apparent on the face of the complaint."); Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (same). Because this deficiency is not capable of amendment, whereas the other pleading deficiencies alleged by the County might only warrant dismissal of the Complaint with leave to amend, the Court is addressing only the statute of limitations issue in this Report and Recommendation.

PLAINTIFF'S ALLEGATIONS

From what the Court can glean from plaintiff's allegations, it appears that plaintiff is a former employee of the County of San Bernardino who was terminated in 1981. Although the County is the only defendant listed in the caption of the Complaint and Supplemental Complaints, it appears from plaintiff's allegations that his claims are directed to adverse determinations by the Workers' Compensation Appeals Board (the "WCAB") and the San Bernardino County Employees' Retirement Association (the "SBCERA"), from whom plaintiff sought a service-connected disability retirement based on injuries he allegedly sustained in the course and scope of his employment with the County. (Complaint at p.10).

It further appears from plaintiff's allegations that he has been attempting unsuccessfully to secure retirement benefits since 1981, and that the actions of defendant(s) giving rise to his claims occurred between 1980 and 1985. (see Complaint at p. 4-18). According to plaintiff, "The board [apparently referring to the SBCERA] provided the conclusive evidence that it was guilty of negligent misrepresentation when on May 03, 1990, (five years later) it allowed Luna disability retirement benefits, retroactive to 11/8." (Id. At p.19). Plaintiff further alleges that, on May 3, 1990, the Board denied him supplemental benefits, without any finding. (Id. at p.34). Then, according to plaintiff, "on May 23, 1995, the board disclosed that the May 03, 1990 'Appropriate finding' actually meant that Luna was capable of gainful employment." (Id) The May 23, 1995 date is the latest date in either the Complaint or the Supplemental Complaints on which any acts of defendant(s) are alleged to have occurred.

In his opposition to the County's motion to dismiss, plaintiff contends that the SBCERA concealed plaintiff's incapacitated condition during the five year period from July, 1985 through June 1990. (See Opposition at p.4-5). Plaintiff further contends that he did not determined that fraud was involved until he consulted with an attorney on or about February 1, 1997. (Id. at p.6).

DISCUSSION

Federal civil rights claims are subject tot he statute of limitations applicable to personal injury claims under state law. Wilson v. Garcia, 471 U.S. 261, 279-80, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985). Federal civil rights claims arising in California after Wilson are subject to the one year limitations period set forth in Cal. Civ. Proc. Code § 340(3). Del Percio v. Thornsley, 877 F.2d 785, 786 (9th Cir. 1989). While state law determines the applicable statute of limitations in a civil rights action, federal law determines when a cause of action accrues, and when the applicable limitations period begins to run. See Venegas v. Wagner, 704 F.2d 1144, 1145 (9th Cir. 1983); Briley v. California, 564 F.2d 849, 854-55 (9th Cir. 1977). A cause of action accrues under federal law, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action. (Vaughan, 927 F.2d at 480; Norco Constr., Inc v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986); Cline v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981).

Here, the injury which is the basis of plaintiff's action is the denial of retirement benefits. Plaintiff's own allegations establish that plaintiff presumably knew or had reason to know of this injury as early as 1981, and clearly by no later than 1990, when plaintiff alleges the SBCERA "provided the conclusive evidence that it was guilty of negligent misrepresentation" and denied him supplemental benefits.

Moreover, even assuming arguendo (a) that the SBCERA concealed facts from plaintiff regarding his injury which had the effect of tolling the limitations period from July, 1985 through June, 1990 under the fraudulent concealment doctrine; and (b) that the limitations period was further tolled thereafter until May 23, 1995, when plaintiff alleges that the SBCERA made a pertinent disclosure about its May 3, 1990 denial of benefits, plaintiff's allegation that he remained ignorant of his claims until he consulted an attorney 20 months later, even if true, did not prevent the statute of limitations from running. The tolling of the applicable statute of limitations in a federal civil rights action also is governed by state law. See, e.g., Hardin v. Straub, 490 U.S. 536, 643-44, 109 S.Ct. 1998, 104 L. Ed. 2d 582 (1989); Torres v. City of Santa Ana, 108 F. 3d 224, 226 (9th Cir. 1997). Under California law, absent some wrongdoing on the defendant's part, a plaintiff's mere ignorance of his cause of action does not toll the statute of limitations. See, e.g., Hinton v. Pacific Enterprises, 5 F. 3d 391, 397 (9th Cir. 1993), Cert. Denied, 511 U.S. 1083 (1994); Garabedian v. Skochko, 232 Cal. App. 3d 836, 840, 283 Cal. Rptr. 802 (1991); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 28, 266 P. 2d 163 (1954).

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) granting defendant County of San Bernardino's Motion to Dismiss; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: 1/29/98

ROBERT N. BLOCK
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E – DISCHARGE LETTER.

SAN BERNARDINO COUNTY
MEDICAL CENTER
East Gilbert Street ▪ San Bernardino, CA 92404 (714)383-3131

September 10, 1981
Mr. Hector Luna, Electrician
Position #07499
County Medical Center

RE: Disability

Dear Mr. Luna:

I have been advised by Helen Boreski, Workers Compensation Officer, that the Department of Industrial Relations of the State of California, Workers Compensation Appeals Board, has found a 30 percent permanent disability to your lower back. Their findings also included that the applicant (you) should avoid heavy work. Your duties as an Electrician at the County Medical Center cannot by fully carried out due to your physical limitations.

Based on the above, the following actions are necessitated:

1. Effective Friday, September 11, 1981, you will be placed on leave without right to return.

   This action is taken pursuant to the Craft, Labor and Trades Memorandum of Understanding. Specifically, Article 4, County Management Rights, and Article 21, Leave Provisions, Section 4, Compulsory Leave.

2. Your case is being referred to Mr. William Leerskov, Occupational Health Coordinator. Mr. Leerskov will be getting in touch with you in regard to rehabilitation.

It is with regret that this action is necessary. Thank you for your contributions to the County Medical Center.

Should you have any questions, please do not hesitate to call.

W.D. KINNEY, Assistant Administrator
Support Services

WDK: JM:sk
Attachment

cc: Jim Meith, Personnel Officer, William Leerskov, Occupational Health Coordinator, Helen Boreski, Workers Compensation Officer

APPENDIX F – INCAPACITY FOR ANY GAINFUL EMPLOYMENT.

CENTRAL SERVICE DEPARTMENT

777 East. Rialto Avenue · San Bernardino, CA 92415 (714) 383-2265

December 10, 1981

Hector Luna
1255 Reece Street
San Bernardino, CA 92411

Re: Letter dated 12-6-81

Dear Mr. Luna:

I have reviewed your file regarding the rehabilitation benefits in order to respond to your letter.

As of December 1, 1981, we are requesting closure of your rehabilitation case since Industrial Support Systems, an independent agency, determined from the testing program that you are not vocationally feasible because of your low tolerances and high levels of pain.

We hope you are satisfied with this explanation for your case closure for this reflects the facts in evidence in your case.

Very truly yours,

CAROL ZARZANA
Workers' Compensation Officer

CZ:mo

cc: Parker & Dally
Bill Leerskov
Todd & Schodde

APPENDIX G – AUG. 31, 1984, JUDGMENT.

Rector D. Land
107 S. Riverside Avenue
Rialto, CA 92376
Telephone: 714/875/4755

Attorney for Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO. CENTRAL DIVISION
351 NO. ARROWHEAD AVE., SAN BERNARDINO, CA 92415

HECTOR V. LUNA,	)	NO. SCR 219774
Petitioner,	)	
Vs.	)	JUDGMENT
SAN BERNARDINO	)	(Petition for Writ of
COUNTY RETIREMENT)		Mandamus)
BOARD,	)	
Respondent.	)	

The above-entitled matter originally came on for hearing on October 10, 1983 in Department 10, the Honorable J. Steve Williams presiding. Evidence was taken by way of testimony of the Petitioner in response to motion picture evidence which was a part of the administrative record and which was shown to Judge Williams. Points and authorities were submitted and the matter was taken under submission. Later, due to illness, the matter was reassigned to Department 4, (Honorable John F. Ingro presiding).

A transcript of the proceedings of October 11, 1983 Certainly it is contradictory to Dr. Swanson's present opinion and certainly Mr. Moench had a right to rehabilitate the record after Mr. Minez was permitted to testify to facts leaving a strong inference that Mr. Luna was fired for reasons other than medical disability.

Respondent argues that evidence of a Workman's Compensation decision is not relevant to this proceeding. However, the Petitioner has never contended that it was. Their contention is that the County fired Mr. Luna for medical evidence. At a minimum, it is strong circumstantial evidence of Mr. Luna's physical disability in 1981.

Viewing the entire record, this Court finds that there is evidence of substantial disability, in 1981, due to a back injury or injuries. The evidence supporting this finding consists of the 1978 cooler pad injury complaint, the 1980 jackhammer injury complaint, Dr. Yamshon's reports of April 16, 1981 and November 17, 1981, Dr. Hammond's report of March 8, 1982, Dr. Dale's report of January 11, 1983 and his testimony, and the fact of his being fired for that reason in 1981.

The issue then becomes, has his condition improved to such an extent that he can now substantially perform his duties as an electrician?

The evidence is conflicting on this issue. Petitioner's points and authorities outline some of the key evidence supporting Mr. Luna's position. Respondent has done the same, including the film which does, indeed, impeach Mr. Luna's testimony in certain respects.

Due to the serious errors referred to above, this Court finds that there was not a fair trial, and there was an abuse of discretion which was prejudicial to the Petitioner. This error alone necessitates a rehearing.

Furthermore, finding No. 11 that the Petitioner "experienced only minor injuries" is not supported by the evidence. The findings that these injuries have long since healed is suspect. First of all, the key issue is healing since September 1981, yet the Board uses the fact of no deterioration in work prior to September 1981 and Mr. Luna's statements on his medical history forms prior to September 1981 as a basis for its findings. The film evidence and testimony of the investigator was properly admitted into evidence. Let the Peremptory Writ issue.

The Respondent shall set aside the decision of June 2, 1982 and shall reconsider the case in light of this Court's opinion and may take such further action as is specifically enjoined upon it by law. The Petitioner is entitled to attorneys' fees I the sum of $1,500.00 plus costs of suit pursuant to Government Code Section 31536.

The Petitioner shall prepare the Judgment and Writ and Statement of Decision (if requested).

Dated: August 31, 1984.

JOHN F. INGRO
Judge of the Superior Court

APPENDIX H – DR. LA TOURETTE'S REPORT.

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PRESENT. MR. JORDAN, THIS IS A WITNESS FOR THE RESPONDENT?

MR. JORDAN: YES. THIS IS Dr. LA TOURETTE. AND IT'S MY UNDERSTANDING THAT MR. LAND DOESN'T HAVE ANY OTHER WITNESSES THAT HE INTENDS TO CALL AND ESSENTAILLY IS RESTING HIS CASE AT THIS POINT IN TIME. I WOULD LIKE TO FOLLOW WITH DR. LA TOURETTE.

THE HEARING OFFICER: YOU ARE RESTING, COUNSEL, SUBJECT TO REBUTTAL?

MR. LAND: YES. RESTING EXCEPT FOR REBUTTAL.

THE HEARING OFFICER: WILL YOU SWEAR THE WITNESS.

GARY JOSEPH LA TOURETTE, M.D.,

CALLLED AS A WITNESS, BEING FIRST DULY SWORNN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE HEARING OFFICER: WOULD YOU STATE YOUR NAME FOR THE RECORD AND SPELL YOUR LAST NAME.

THE WITNESS: GARY JOSEPH LA TOURETTE.

L-A- CAPITAL-T-O-U-R-E-T-T-E.

DIRECT EXAMINATION

BY MR. JORDAN:

Q. YOUR OCCUPATION IS THAT OF AN ORTHOPEDIC SURGEAN; IS THAT CORRECT?

A. THAT'S CORRECT.

B. AND THIS IS THE SECOND HEARING THAT WE'VE HAD ON HECTOR LUNA, AND WE'VE INTRODUCED INTO THIS HEARING A TRANSCRIPT OF THE EARLIER HEARING WHICH OCCURRED ON...

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IT WOULD IMPROVE HIS CHANCES, YES. IF HE HAD AN ARTHROSCOPIC EXAMINATION WHICH SHOWED THAT THERE WAS NO CARTILAGE DAMAGE AND THAT THERE WAS NO SYNOVIAL HYPERTROPHY OR TENDINITIS, BUT THAT THERE

WAS MAYBE A MINOR IMPINGEMENT, THEN THAT WOULD IMPROVE HIS CHANCES.

Q. OKAY. NOW, AS I UNDERSTAND IT, THE PRIMARY REASON FOR EXAMINING MR. LUNA WAS FOR HIS BACK INJURY. THAT'S CORRECT, ISN'T IT?

A. THAT'S CORRECT.

Q. THIS EXAMINATION TOOK PLACE IN YOUR OFFICE?

A. THAT'S CORRECT.

A. THAT'S CORRECT.

Q. OKAY. AND AT THE TIME YOU CONDUCTED THE EXAMINATION ON MR. LUNA, DID YOU HAVE ANY X-RAYS BEFORE YOU?

A. HE APPARENTLY BROUGHT HIS OWN X-RAYS.

Q. WHAT?

A. HE BROUGHT X-RAYS DATED 12-19-1984.

Q. DID YOU STUDY THE X-RAYS?

A. YES.

Q. NOW, ORIGINALLY YOU STATED IN YOUR FIRST REPORT OF JANUARY THE 18TH, '83, DOCTOR, AS I UNDERSTAND THE SECOND PAGE OF THAT – AND I QUOTE – " I, AS HIS PHYSICIAN, PLACED A RESTRICTION OF NO VERY HEAVY LIFTING." OKAY. THAT WAS YOUR OPINION AT THAT TIME; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. NOW – BUT NOW WE GO TO THE SECOND REPORT, AND WE ADD IN THE FROZEN SHOULDER SYNDROME. AND IT WOULD STILL BE YOUR OPINION NOW THAT THIS MAN COULD NOT WORK AS AN ELECTRICIAN?

A. THAT'S CORRECT.

APPENDIX I – RES JUDICATA

Federal court must give to state court judgment the same preclusive effect as would be given that judgment effect under law of state in which judgment was rendered. 28 U.S.C.A. sec. 1738; U.S.C.A. Const. Art. 4, sec. 1.

APPENDIX J – COUNTY WRITTEN AGREEMENT

PROMISE AND RELEASE AGREEMENT
HECTOR V. LUNA vs. COUNTY OF SAN BERNARDINO
80 SBR 76430; 76431; 76432; 76433; 132(a)

10. Reason for Compromise:

The applicant has been advised that by the signing of this Compromise and Release Agreement that in the event that applicant should subsequently incur any illness which might result in his death that this Compromise and Release Agreement will release and forever bar any claim by any of applicant's dependents and/or heirs. Being so advised, applicant chooses to voluntarily reach the settlement indicated herein. The release of any and all claims of the applicant's dependents to death benefits relating to this injury has been considered in arriving at this Compromise and Release Agreement.

Applicant has been advised and fully understands that this Compromise and Release Agreement releases any and all claims of the applicant's dependents to death benefits relating to the injury or injuries covered by this Compromise and Release Agreement.

In addition to the above issues, the parties do intend to and do hereby settle the other remaining issues including parts of body injured; temporary disability claimed, either vocational rehabilitation, temporary disability or temporary total disability; permanent disability; apportionment; need for future medical treatment; self-procured medical expenses; medical-legal expenses; attorney fees; transportation expenses; any claim for penalty for the claim of untimely provision of benefits, or the unreasonable denial of benefits; and any and all other issues relevant and pertinent hereto.

The parties do hereby settle any claim the applicant has against the employer for benefits under Labor Code §132(a). The employer does specifically buy its peace with the settlement of this claim. The employer is self-insured as to Workers' Compensation interests and has included a premium for the settlement of the 132(a) issue within the settlement dollars.

Concurrent with the present Compromise and Release there is a concurrent settlement contingent upon a joint settlement of both the Workers' Compensation issues and the pending claim against the County of San Bernardino Board of Retirement. As part of the concurrent settlement the Board of Retirement shall make the appropriate findings and approve a nonservice connected disability retirement with no supplemental included therein. As a term of the settlement the approval shall be deemed as having been approved on November 11, 1981. No interest shall accrue on past sums and the amounts to be paid to Mr. Luna by the Board.

LAW OFFICES OF ELOISE GOMEZ REYES

By:_____

Attorney for applicant

BOARD OF RETIREMENT OF SAN BERNARDINO

COUNTY EMPLOYEE'S ASSOCIATION

By:_____

HECTOR V. LUNA, Applicant

PARKER & DALLY, A Professional Corp.

By:_____

RAYMOND A. FLEMING, Administrator

By:_____

Attorneys for Defendant

APPENDIX K – LETTER TO RESIGN DATED 4/2/87.

SAN BERNARDINO COUNTY MEDICAL CENTER
780 E. Gilbert St. San Bernardino, CA 92404
714-387-8111

April 2, 1987 **certified mail**

Mr. Hector Luna
1255 Reece Street
San Bernardino, CA 92410

Dear Mr. Luna:

I have been notified by the Board of Retirement that your application for disability retirement has been denied. Enclosed, for you convenience, are the necessary forms to complete the resignation process. Please complete the forms and submit to my office at the County Medical Center, 780 East Gilbert Street, San Bernardino, CA 92404, attention: Personnel Department.

Sincerely,

DENNIS R. SHEARER, Personnel Officer
County Medical Center

DRS: pab
Enclosures

cc: Board of Retirement

APPENDIX L – GOVERNMENT CODE SECTION 31725

At p. 537, reads: "under the provisions of [sec. 31725], the employer is entitled to secure judicial review of a decision denying an employee retirement Board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. ***If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee."*** At p.538, reads: "the court concluded the County Employees' retirement law of 1937, in which section 31725 was found." At p.541 reads: "section 31725 does not mandate reinstatement to active duty status. The language and legislative intent reflect the purpose of the statute is to mandate reinstatement to paid status."

[13] reads: the employer cannot deny disability retirement on the basis of there being no disability and then claim disability in order to deny employment income.

APPENDIX M – ALLEN V. BOARD OF ADMINS. OF PUBLIC

Allen v. Board of Administration of Public Emp. 192 Cal. Rptr. 762 (1983) at p.763 reads: a public employee's pension constitutes an element of compensation, as a vested contractral right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractral obligation of the employing entity, **U.S.C.A. Const. Art. 1, sec. 10, cl. 1**; West's Ann Cal. **Const. Art.1, sec. 9**: Under the constitutional clause the plaintiff has a right to have a judicial determination declaring the nullity of the attempt to impair its obligations.

The California constitution forbids a state, including of course its subdivisions to impair the obligation of contract.

APPENDIX O – PHILLIPS V. COUTNY OF FRESNO

*In Philips v. County of Fresno,*225 Cal. App. 3rd 1240, it was established that when a member is off work for disability, and the Board denies him disability retirement pension benefits, the County has the obligation to either put the member to work or take judicial action to get him a disability retirement, pursuant to **Gov. code sec. 20164(2)**.

APPENDIX P – FREDRICHSEN V. CITY OF LAKEWOOD

Under, *Fredrichsen v. City of Lakewood*, 99 Cal. Rptr. 13, (3) reads: Estoppel, with respect to filing of timely claim against government, is available in all circumstances in which complaint alleges the facts which, if true would establish that the government had acted in an unconsciously manner.

APPENDIX Q – RUSSELL V. DUNSTON

Russell v. Dunston, 896 F2d 664 (2nd Cir) (1990) at p. 665 (2) reads: the entitlement to DISABILITY retirement is a constitutionally protected interest for purposes of sec. 1983. 42 U.S.C.A. 1983, *Board of Regents v. Roth*, 92 S.Ct. 2701.

APPENDIX R – SUPERVISOR JERRY EAVES LETTER

Supervisor Jerry Eaves,
Fifth District · San Bernardino, CA

May 31, 1996

Dear Mr. Eaves:

The requisite for supplemental benefits is worded simple and direct on Gov. code section 31740. A member's incapable of gainful employment shall be allowed supplemental. The above law is quite clear, that non-employment is a determining factor for the retirement supplemental allowance (last paragraph).

The reasonable reading into Gov. code 31740 is that documentation of non-employment is essential for supplemental, to such a point, that declarations by the member of non-employment are necessary to continue eligibility for supplemental. The letter dated September 10, 1981, is a legal document under a Labor Agreement between the County of San Bernardino and the "General" Employees Union. The initial certification of Luna's non-employment.

The letter dated December 10, 1981, is a legal document based on a bonified Independent Agency Evaluation Service results: Documenting Luna's incapable of any gainful employment; therefore, ineligible for rehabilitation benefits. A legal documentation of non-employment after Dec. 10, 1981. The two letters above are legal documents which attest to Luna's non-employment because he is incapable of any gainful employment.

The SBCERA BY-LAWS, dated June 30, 1980 are plain on Item (5) determinations by the SBCERA shall be based on the evidence presented for each item. The evidence for item (5)c ; in the Luna file included the documentation of the letters dated 9/81 and 12/81.

Page 1403, on the SBCERA record books, shows a precedent was set by the SBCERA in the Mr. L. Kirkland case. Mr. Kirkland was referred to a Service Agency for evaluation to determine if he was capable of any gainful work. Supplemental benefits were allowed, based on the evaluation results. Luna's documentation of non-employment due to incapable of gainful work were made by local government entities, based on the rule of law. The documentation above certifies that Luna is legally entitled to $300.00 per month retroactive to Dec. 10, 1981. Pursuant to Gov. code 31740.

Hector Luna

APPENDIX S – PLAINTIFF'S MOTION FOR ORAL ARGUMENT BEFORE THE 9TH CIRCUIT PANEL

Hector Luna
1255 Reece St.
San Bernardino, CA 92411
(909) 888-0928

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket #:98-55762
Lower Court Docket #: CV-97-08874-ABC

HECTOR V. LUNA
Plaintiff-Appellant

Appellant/Plaintiff's Addendum to his motion for oral argument.

vs.

COUNTY OF SAN BERNARDINO
Defendant-Appellee

Inadvertently omitted from Appellant's request for oral argument were the issues of California State laws as to employer/employee rights, obligations, and public policy for correcting pension payment errors.

Under Government Code, sections' 20165 and 20180 procedures are provided to correct omissions by the employer when involving civil service pensions.

Section 20165 reads in part: "the retired person will receive the actuarial equivalent of the allowance to which the member is entitled."

Section 20180 was interpreted under case law, *Rodie v. Board of Administration,* public emp. Retirement system (1981), 171 Cal. Rptr. 433, at p.437[1] that reads: "[W]e interpret section 20180 as broadly available for the corrections of errors or omissions made by employees, their employers... or the system... is embraced by the statute."

At *Rodie v. Board of Administration,* p. 437 reads: "[W]e read section 20180 to provide, that the **mistake shall be corrected,** *nunc pro tunc,* if it can be done so in accordance with section 20165."

In *Jordan v. Retirement Board, S.F. City and County Employee Retirement System,* 35 C.A. 2d 653, (1939) at p.656 [1] this case law reads: "It is well established, however, that pensions rights do not vest at the time of enactment of the law, but only upon the happening of the contingency or event upon which the right hereto occurs.

O'Dea v. Cook, 176 Cal. (1917) 659. [169 pac. 366] (O'Dea at p.659) reads: pensions-contract-statutes. "where services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation and a part of the contract itself."

In *Jordan,* (at p. 657 top paragraph) reads: "Here Jordan's right to a pension vested in him in 1914 at the time of his injuries and retirement, and having vested in him at the time his right thereto could not have been subsequently taken away." *(O'Dea v. Cook, Supra).*

The state laws cited above are directly relevant to the Employer-appointed orthopedic medical examination undertaken by the appellant on April 9, 1987, involving the Industrial disability issue in the instant case. (three page medical report addressing the industrial injury issue by Dr. John N. McAllister, M.D., submitted as exhibit "Q").

DATED: Nov. 3, 1998

CC:
S.B. County Counsel
WCAB
S.B. County Employer
Retirement Association

Respectfully Submitted,

_____

Hector Luna, in pro se
1255 Reece St.
San Bernardino, CA92411
(909) 888-0928

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States court of Appeals decided my case was Nov. 18, 1998.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 23, 1999, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A -_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix __.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix __.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A - ___.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

Supreme Court, U.S.
FILED

No. 991121 OCT 21 1999

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

HECTOR V. LUNA, - PETITIONER
In pro se

VS.

COUNTY OF SAN BERNARDINO - RESPONDENT(S)
& ITS PRIVITIES, THE SAN BERNARDINO COUNTY RETIREMENT BOARD.

PROOF OF SERVICE

I, Alma Guadalupe L., do swear or declare that on this date, Dec. 29, 1999, as required by Supreme Court Rule 29. I have served the enclosed PETITION WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

San Bernardino County, County Counsel	385 N. Arrowhead Ave. 4th Fl. San Bernardino, CA 92415
WCAB	45 Freemont St. Room 410 San Francisco, CA 94105
County Employees' Retirement Assoc.	195 N. Arrowhead Ave. San Bernardino, CA 92415

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12-29 1999

Alma Guadalupe
(Signature)